LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
JAN 7 1966
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

October Term, A.D. 1965

No. 885

ALVIN T. SMITH,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Illinois.

Fleetwood M. McCoy,
Ellis E. Reid,
123 W. Madison Street,
Chicago, Illinois 60602,
FRanklin 2-1106,
Attorneys for Petitioner.

MIDWEST LAW PRINTING CO., 225 N. MICHIGAN, CHICAGO 60601, FINANCIAL 6-2088

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Constitutional and Statutory Provisions	3
Statement of the Case	4
Reasons for Granting Writ	8
Conclusion	8
Appendices:	
I—Order of the Illinois Supreme Court	1a
II—Opinion of the Appellate Court of Illinois, First District	1a
III—Constitutional and Statutory Provisions	10a
IV—Judgment Order	11a

CITATION OF AUTHORITIES

Cases:	
Bouie v. City of Columbia, 378 U.S. 347, 84 S. Ct. 1697 (1964)	9
People v. Barnes, 314 Ill. 140, 145 N.E. 391 (1924)	9
People v. Edge, 406 Ill. 490, 94 N.E. 2d 359 (1950)	9
People v. Fore, 384 Ill. 455, 51 N.E. 2d 548 (1943)	9
People v. Pronger, 48 Ill. App. 2d 477, 199 N.E. 2d 239 (1964)	9
Constitutional Provisions:	
U. S. Constitution, Amendment XIV	8, 10a
Statutes:	
Chapter 38, Section 33-3, Illinois Revised Statutes (1963)	8, 10a

In the

Supreme Court of the United States

October Term, A.D. 1965

No.

ALVIN T. SMITH,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Illinois.

To: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays a Writ of Certiorari issue from this court to review the judgment of the Supreme Court of Illinois entered in the above-entitled cause.

OPINION OF THE COURT BELOW.

The Supreme Court of Illinois did not render a written opinion, only an order dismissing the appeal for lack of jurisdiction. That order is set forth in Appendix I, *infra*. The opinion of the Appellate Court of Illinois is reported in 57 Ill. App. 2d 74, 206 N.E. 2d 463 (1965) and is reproduced herein as Appendix II, *infra*.

JURISDICTION.

The decision of the Supreme Court of Illinois was entered on September 9, 1965. Upon the motion duly made, the time for filing this petition was extended on December 8, 1965, by order of Mr. Justice Clark, to and including January 7, 1966. The jurisdiction of this court is invoked under Title 28, U.S.C., Sec. 1257(3).

QUESTIONS PRESENTED.

1. Whether the petitioner was denied equal protection and due process of law, as guaranteed to him by the Fourteenth Amendment to the Constitution of the United States, being convicted under an indictment which did not charge a criminal offense under Illinois law until the Illinois courts, by judicial fiat, combined two separate statutory offenses into one thereby creating a new hybrid offense.

2. Whether Chapter 38, Section 33-3(c), Illinois Revised Statutes (1963), as construed by the courts below, is violative of due process and therefore void in that petitioner was punished under it for conduct which could not reasonably be understood as being prohibited until the courts below construed the statute as they did, holding that the indictment below charged an offense under said sub-section.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The proceedings below raise substantial questions under Amendment 14 to the Constitution of the United States. The following statute is involved:

Chapter 38, Sec. 33-3 Illinois Revised Statutes (1963).

These are set forth in Appendix III, *infra*.

STATEMENT OF THE CASE.

This is a criminal case. Petitioner was indicted for bribery and for official misconduct under the pertinent statutes of the State of Illinois. At the close of the State's evidence, the court, sitting without a jury, found the petitioner not guilty of the crime of bribery. At the close of all the evidence, the court found the petitioner guilty of the crime of official misconduct under Chapter 38, Sec. 33-3, Illinois Revised Statutes (1963).

The indictment, insofar as it concerned the charge of official misconduct, charged as follows:

* * * * *

> "Alvin Smith committed the offense of official misconduct in that he, a police officer of the City of Chicago, acting in his official capacity, and *with the intent to obtain a personal advantage for himself, performed an act which he knows is not authorized by law,* to-wit: said Alvin T. Smith, solicited a fee of $50.00 from Paul Browning to have the charge of petty theft and possession of fictitious license plates placed against the said Paul Browning by said Alvin T. Smith on November 5, 1963, dismissed from court when said charge came up for a hearing on November 6, 1963, * * *" (Abst. 34).[1] (emphasis added)

---

[1] Reference to abstract of trial record contained on page 5 of the certified record from the Supreme Court of Illinois referred to as Abst. and followed by the page number of the abstract.

The statute involved is set forth in full in Appendix III, *infra*, however, it reads in pertinent part as follows:

> "A public officer or employee commits misconduct when, in his official capacity, he commits any of the following acts:
>
> • • • • •
>
> "(c) With intent to obtain personal advantage for himself or another, he performs an act in excess of his lawful authority; or
>
> "(d) Solicits or knowingly accepts for the performance of any act a fee or reward which he knows is not authorized by law."

On November 5, 1961, petitioner, who had been a police officer in the City of Chicago for almost 5 years, observed a man named Paul Browning on a public street, pushing a car with improperly displayed license plates. When questioned, Browning said he had purchased the car with the plates on it. Upon checking, the petitioner learned that the plates were stolen. Petitioner then arrested Browning for having stolen plates and for petty theft, and being unable to locate the person who owned the plates, signed a complaint himself (Abst. 39).

Prior to the Browning trial the following day, petitioner and Browning had a conversation. When the case against Browning was called for trial, Browning was asked by the Assistant State's Attorney where he got the plates. Browning replied that he got them from a junk yard. When questioned by the Assistant State's Attorney, the petitioner corroborated this was the same story told to him by Mr. Browning when he arrested him. The State's Attorney then moved the court to strike the charges from the call with leave to reinstate and told the petitioner that if he could get the goods on the defendant, to come

back in (Abst. 10). After leaving court, Browning told the petitioner that he would take him where the car was purchased if the petitioner would come to his house (Abst. 40). Petitioner went to Browning's house about 5:00 P.M. that evening to find no one there. He left his card with his phone number on it (Abst. 45). After later hearing from Browning, the petitioner returned to Browning's home at about 8:15 that evening (Abst. 6, 7, 41). What occurred then is subject to two conflicting stories. The defendant testified that when he walked into Browning's apartment, Browning offered him some money. The petitioner told him that "you can't pay me to do my duty" and turned around and walked out and was then interrupted by two police officers who came out of another room in the apartment (Abst. 41). Browning testified that petitioner had offered to fix his case for $50 and that when the petitioner came into his home that Browning asked him to explain to his wife why he wanted the money. Browning then stated that the petitioner told his wife that he needed the money to "pay the complaining witness" (Abst. 4, 6). The police officers who were hidden in the home testified about hearing a conversation, but other words were used and the corroborating testimony varied. Also, the officers testified as to their conversation with the petitioner during the trip to the police station (Abst. 16, 17, 23, 30). It was undisputed, however, that the petitioner did not, at any time, accept any money from Mr. Browning.

Petitioner was sentenced on the official misconduct charge to 6 months in the House of Correction and 3 years probation (Abst. 57). A motion for new trial, made on behalf of the petitioner, was denied by the trial court

(Abst. 57). An appeal was taken by petitioner to the Appellate Court of Illinois, First District, and in that appeal the petitioner urged, *inter alia*, that the indictment which allegedly stated the offense of official misconduct, did not charge a crime and was substantially defective. The Appellate Court disagreed and construed the statute involved to encompass the petitioner's alleged conduct under either sub-section (c) or (d) of the statute and held that, although it was not clear which sub-section the indictment intended, the indictment was not substantially defective.

An appeal was taken to the Supreme Court of Illinois. The jurisdiction of that court was invoked under the Illinois Constitution, Art. VI, Sec. 5, which permits an appeal as a matter of right where a question under the Constitution of the United States and/or the Constitution of Illinois, arises in and as a result of the action of the Appellate Court. In that appeal the petitioner urged that the statute involved, i.e., Chapter 38, Sec. 33-3, Illinois Revised Statutes (1963), as construed by the Appellate Court, denied him due process and hence was void because it was rendered vague and uncertain by judicial fiat. The petitioner also again urged that the indictment failed to charge a criminal offense.

The Supreme Court of Illinois, on September 9, 1965, entered an order dismissing the petitioner's appeal. It is that order which has the effect of affirming the opinion of the Appellate Court which the petitioner seeks to have this Court review on writ of certiorari.

REASONS FOR GRANTING WRIT.

1. The petitioner was denied equal protection and due process of law, as guaranteed to him by the Fourteenth Amendment to the Constitution of the United States, by being convicted under an indictment which did not charge a criminal offense under Illinois law until the courts below, by judicial fiat, akin to ex post facto legislation, combined two separate statutory offenses into one hybrid and held that the indictment stated that offense.

Fundamental fairness dictates that a criminal statute, which has several sub-sections, declaring different conduct to be criminal, would require an indictment to specifically inform a defendant which sub-section he is being charged with violating. As more fully explained below, the language of sub-sections (c) and (d) of the statute in question (Chapter 38, Section 33-3, Illinois Revised Statutes, (1963)) would indicate that they declared different conduct to be criminal. Clearly, a course of conduct may run afowl of both sub-sections (c) and (d); but (c) and (d) are not the same in substance. The petitioner had the right to know which sub-section he was being charged with.

It is apparent from the opinion of the Appellate Court, set forth at Appendix II, *infra*, that even the Illinois Appellate Court does not know from reading the indictment, which sub-section applies, (c), (d), or both. The Appellate Court in its opinion states "although the language of the indictment is taken from both sub-sections, (c) and (d), we believe it is sufficient to charge defendant

with the offense of 'official misconduct' under the terms of either sub-section. * * * We hold the indictment sufficient to charge the offense of 'official misconduct' under either (c) or (d)."

This indictment charges a hybrid of two sub-sections, and therefore, in actual fact, charges neither. The courts below are saying that the hybrid is actually twins made up of the two sub-sections. The petitioner urges that the hybrid is an entirely new offense, previously unknown to the law of Illinois. Clearly, such plain confusion which would cause an Appellate Court not to know which subsection of a statute actually *is* being charged, when it's plain that *both* are not being charged, must amount to a denial of due process to a defendant who has the basic right to know, without equivocation, the exact nature of the charge he is obliged to defend against.

The highest degree of certainty is essential to a proper indictment, and in Illinois, a substantially defective indictment can be attacked at any time because it is void and the court would, therefore, lack jurisdiction of the subject matter. *People* v. *Edge,* 406 Ill. 490; *People* v. *Fore,* 384 Ill. 455; *People* v. *Barnes,* 314 Ill. 140; and *People* v. *Pronger,* 48 Ill. App. 2d 477.

---

2. A deprivation of the right to a fair warning of what conduct a statute prohibits can result, not only from vague statutory language, but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language. *Bouie* v. *City of Columbia,* 378 U.S. 347, 84 S. Ct. 1697 (1964).

Sub-sections (c) and (d) are expanded by the construction placed on the statute by the Appellate Court. The

legislature appeared only to be condemning as criminal under sub-section (c) an act done which had some reasonable relationship to one's official duties, but which was actually in excess of the authority conferred by that official capacity, if the requisite intent was present. In sub-section (d), the legislature appeared to be condemning the solicitation or reception of a fee for an act done in the person's official capacity when that person knew the fee was not authorized by law. But in sub-section (d), the word "act" also was only intended to encompass that which has some reasonable relationship to the defendant's official duties.

The courts below ruled that the act of soliciting a bribe would be the type of act which was meant by the statute under sub-section (c). It is respectfully suggested that if the legislature had intended such a construction, there would be no need for sub-section (d), expressly making the *solicitation* of an unauthorized fee criminal.

The construction by the courts below renders sub-section (c) of the statute unconstitutionally vague, because they have, after the fact, unforeseeably expanded this portion of the statute to condemn an act which was clearly outside of petitioner's official capacity. This has so broadened the scope of the statute, as to render it vague and uncertain.

It is suggested that, although it may appear that this is only one isolated case involving a police officer who allegedly solicited a bribe, the matter has broader implications. If the construction of this relatively new statute (enacted in 1961) is allowed to stand without intervention by this court, millions of employees and officers of the State of Illinois and its political subdivisions will

be subjected to the possibility of punishment under this statute for *any act,* if the requisite intent is there, whether or not the said act has a reasonable relationship to their official duties.

By holding that the conduct suggested in the videlicet of the indictment below related to the type of conduct condemned by sub-section (c), the court has destroyed the reasonableness of the statute. It has included in the word "act" conduct which had no relationship whatsoever to petitioner's official duties. By that very same reasoning, it could now be criminal in Illinois for a city employee to be caught playing checkers on "company time."

Therefore, since it is not clear whether petitioner is charged under sub-section (c) or (d); but it is quite clear that petitioner could not reasonably foresee this conduct being condemned by (c), the statute, as construed by the courts below, must fail in this regard and petitioner's conviction must be reversed.

CONCLUSION.

For the above and foregoing reasons, it is respectfully suggested that the Supreme Court of Illinois has decided a federal question in a way probably not in accord with the applicable decision of this court, and the petitioner prays that a writ of certiorari issue from this court to review the judgment of the Supreme Court of Illinois in this case.

Respectfully submitted,

FLEETWOOD M. MCCOY,
ELLIS E. REID,
Attorneys for Petitioner.

APPENDIX

APPENDIX I

Order of the Supreme Court of Illinois

The following order was entered on September 9, 1965, by the Supreme Court of Illinois:

"This case is here as an appeal of right from the Appellate Court, First District. Jurisdiction is based upon the ground that a constitutional question arose for the first time as a result of the decision of that court. We have examined the briefs of the parties, and we have determined that the claim of jurisdiction is without merit. On the court's own motion the appeal is therefore dismissed."

APPENDIX II

Opinion of the Appellate Court of Illinois, First District

Mr. Justice Murphy Delivered The Opinion Of The Court.

In a bench trial, defendant, Alvin T. Smith, a Chicago police officer, was found guilty of the offense of "official misconduct" (Ill. Rev. Stat. 1963, Ch. 38, § 33-3) on evidence which showed that he had solicited $50 from Paul Browning for the dismissal of a criminal charge against Browning. Defendant was admitted to probation for a term of three years, with the first six months to be served in the House of Correction. He appeals from the conviction

tion and from the refusal of the court to modify the probation order.

Defendant contends (1) the indictment did not adequately allege and "the State has failed to prove the defendant guilty of 'official misconduct' under Illinois law. Therefore, the trial court should have directed a verdict for the defendant"; (2) "the verdict of the trial court is against the manifest weight of the evidence"; and (3) "the trial court erred in refusing to reduce defendant's sentence."

On November 5, 1961, defendant, Alvin T. Smith, arrested Paul Browning and charged him with petty theft and possession of stolen automobile license plates. On November 6, 1961, after a short hearing of the charges against Browning, the court, on motion of the State, struck the complaint, with leave to reinstate, in order that Smith might further investigate the charges.

On the evening of November 6, 1961, defendant Smith appeared at the apartment of Browning. After a conversation between Smith, Browning and Browning's wife, two police officers, who had been concealed in the apartment, appeared and arrested Smith. He was indicted for "bribery" and "official misconduct."

The "official misconduct" indictment charged that "Alvin T. Smith committed the offense of official misconduct, in that he, a police officer of the City of Chicago, acting in his official capacity, and with the intent to obtain a personal advantage for himself, performed an act which he knows was not authorized by law, to-wit: the said Alvin T. Smith solicited a fee of $50.00 from Paul Brown-

ing to have the charge of petty theft and possession of fictitious license plates placed against said Paul Browning by said Alvin T. Smith on November 5, 1963, dismissed from Court when said charge came up for hearing on November 6, 1963, contrary to the Statute."

At the trial of the charges against defendant Smith, Browning and three police officers testified on behalf of the State. Browning testified that on the morning of November 6, while outside of the courtroom, Smith said, "I want to be precise, I can fix your case for fifty bucks • • • Is it worth that?" and Browning replied, "Yes, it's worth that, but, gee, I think I have all the information that I need not to go to jail," and Smith said, "Okay, I'll talk to you later," and when the case was called, it was dismissed; after Browning left the courtroom, Smith said, "I fixed up your case • • • I kept the complaining witness out of court"; as Browning said he did not have the money with him, arrangements were made for Smith to get the money later at Browning's home; later that day, Browning went to a police station and told a Sergeant what happened, and that Smith was to pick up the money at five o'clock; Officer Walsh accompanied Browning home, where Browning was given a note left by Smith, with a telephone number on it; later Browning called the number and talked to defendant Smith, who said that he would be there about eight o'clock.

Browning further testified that when Smith arrived at Browning's basement apartment at about 8:15 P.M., Mrs. Browning was present, and two police officers were concealed, one in a washroom and the other in a bedroom. The doors to both of these rooms were open as Browning

talked with defendant in the kitchen, "two or three feet" away. "I told him (defendant Smith) to tell my wife why he was getting this money and to explain to her that I didn't offer him any money. He told me, he say, 'Well, I fixed up Paul's case and kept him from getting two or three years.' I asked him, 'What would you get out of this?' and he said, 'I had to pay the complaining witness, I kept him out of court, and I would get a little something.' * * * I told him, I said, 'Well, all I could get was $20. * * * I could write you a check for the remaining $30.' He said, 'No, I can't be bothered with no check.' So, as I was passing him the * * * two $10 bills, it was marked money, and as he was reaching the lieutenant (Lieutenant Siedlecki) approached the kitchen. * * * he identified himself and told Officer Smith to identify himself. * * * The two $10 bills, well, I laid them on the table and I told him, 'This is all I could get.' He never did take the money * * *."

Lieutenant Charles G. Siedlecki, in charge of the Complaint Division for the Internal Investigation Division of the Chicago Police Department, testified that he heard a conversation in the Browning apartment between Browning and "a stranger," later identified as Smith, in which Smith said, "I had to help you a lot in Court today, I had to keep the owner of the license plates away from court and I had to pay the State's Attorney. * * * Otherwise you may have gotten one to two years * * *. I spent some of my own money on this case, the original deal for $50 still stands," and Browning said, "Well, I've got $20 and I can write you a check for the $30," and Smith said, "I don't want to be fooling around with a check."

When he heard Browning say, "Well, take this $20 anyway," "I stepped out and confronted the gentleman I now know to be Officer Alvin Smith. • • • (On the way to the station) I asked Officer Smith how much money was involved, and he told me it was $50 involved. I asked him, 'What did you want the money for?' and he said, 'I was doing it as a favor'—I'm not sure if he used the word 'favor' but he said he was doing it for somebody and he intimated it was somebody around the court, but he wouldn't elaborate."

Officer James Walsh, also assigned to the Internal Investigation Division, testified that he was present in the Browning apartment on November 6 and heard the conversation that took place between Browning and Smith. He corroborated in detail the testimony of Browning and Lieutenant Siedlecki.

Officer Ralph Fivelson also testified for the State that while they were driving defendant Smith to police headquarters, he heard the Lieutenant say to the defendant, "Why did you want the $50," and the defendant "mentioned that he wanted it for the—for some people in the court."

At the close of the State's case, the court made a finding of not guilty on the charge of "bribery," and the trial proceeded on the charge of "official misconduct."

Defendant testified and, in substance, denied the testimony of the witnesses for the State. He stated he went to the Browning home because Browning had informed him he would show Smith where he bought the car which bore the stolen license plates. He further said Browning

offered him money, but "I told him he can't pay me nothing to do my duty, and then I turned around and started to walk out • • •."

Initially, we consider defendant's contention that the State has failed to prove him guilty of "official misconduct." In pertinent part, the statute provides:

> "A public officer or employee commits misconduct when, in his official capacity, he commits any of the following acts:
>
> "• • •
>
> "(c) With intent to obtain a personal advantage for himself or another, he performs an act in excess of his lawful authority; or
>
> "(d) Solicits or knowingly accepts for the performance of any act a fee or reward which he knows is not authorized by law."

Defendant contends that the indictment is not fully descriptive of the offense of official misconduct and omits substantial elements of that offense, including certain conditions under sub-sections (c) and (d). (*People* v. *Scholl*, 339 Ill. App. 7, 88 N.E. 2d 681 (1949)), and "even if the language of the charges conforms to the proof, the offense charged under Illinois law is not established." *People* v. *Begley*, 270 Ill. App. 197 (1933); *People* v. *Harshbarger*, 304 Ill. App. 634, 27 N.E. 2d 860 (1940); *People* v. *Brown*, 312 Ill. 63, 143 N.E. 440 (1924).

We agree with defendant that the body of an indictment must specifically state the essential elements of the crime with which a defendant is charged (*People* v. *Sellers*, 30 Ill. 2d 221, 223, 196 N.E. 2d 481 (1964)), and

where intent is made a part of the offense, it should be alleged in the indictment and proved on the trial. The charge, as alleged, must be an offense against the law, and if the facts alleged may all be true and yet constitute no offense, the indictment is insufficient. *People* v. *Barnes,* 314 Ill. 140, 144, 145 N.E. 391 (1924).

As argued by the State, however, an indictment based on a statute need not follow the exact language of the statute. (*People* v. *Love,* 310 Ill. 558, 567, 142 N.E. 204 (1923); *People* v. *Pronger,* 48 Ill. App. 2d 477, 481, 199 NE. 2d 239 (1964).) Where "the indictment charges the offense substantially in the language of the statute, the indictment is sufficient." (*People* v. *Lloyd,* 304 Ill. 23, 43, 136 N.E. 505 (1922).) "Where the language of the information is as fully descriptive of the offense as the language of the statute denouncing it, and alleges every substantial element of the offense as defined by statute, the information is sufficient," *People* v. *Clarke,* 407 Ill. 353, 359, 95 N.E. 2d 425 (1950).

After an examination of the indictment in the light of the authorities cited, we conclude that while it does not contain all the language of the statute on the subject, it "states the offense in language sufficiently explicit that the defendant may know the nature of the charge against him and the jury hearing the cause may understand it." (*People* v. *Love,* 310 Ill. 558, 567) Although the language of the indictment is taken from both subsections (c) and (d), we believe it is sufficient to charge defendant with the offense of "official misconduct" under the terms of either subsection, and "is as fully descriptive of the offense as the language of the statute denouncing it, and alleges

every substantial element of the offense as defined by statute." (*People* v. *Clarke,* 407 Ill. 353, 359) Subsection (c) of the statute describes the crime as an "act in excess of his lawful authority." The indictment charges "an act which he knows was not authorized by law," language taken from subsection (d). The variance in language and concept between the two is not sufficient to deprive the defendant of notice of the nature of the charge against him under subsection (c). If anything, the indictment contains the additional element of knowledge, which subsection (c) does not require. We hold the indictment sufficient to charge the offense of "official misconduct" under either (c) or (d).

We next consider defendant's contention that "the verdict of the trial court is against the manifest weight of the evidence," which we consider equivalent to a contention that the evidence did not prove his guilt of the charges set forth in the indictment beyond a reasonable doubt.

The rule to be applied here is, "where a case is tried by the court without a jury, the determination of the credibility of the witnesses and the weight to be accorded their testimony is committed to the trial judge; and, unless it can be said that the court's judgment is found to rest on doubtful, improbable or unsatisfactory evidence, or clearly insufficient evidence, a reviewing court will not substitute its judgment for that of the court below even though evidence regarding material facts is conflicting and irreconcilable." *People* v. *Clemons,* 26 Ill. 2d 481, 484, 187 N.E. 2d 260 (1962).

(Appellate Court Opinion)

The testimony of both Browning and the police officers, although denied by defendant, is not doubtful, improbable or unsatisfactory evidence, and if found sufficient by the trial court to sustain the charge of "official misconduct," we find no reason to substitute the judgment of this court for that of the trial court. The evidence in this case does not justify entertaining a reasonable doubt of defendant's guilt. *People* v. *Jordan*, 18 Ill. 2d 489, 492, 165 N.E. 2d 296 (1960).

As to defendant's final contention that "the trial court erred in refusing to reduce defendant's sentence," we find nothing in the record to substantiate this contention. The trial judge, in considering defendant's motion for a modification of the probation conditions, gave consideration to defendant's financial status and stayed a mittimus several times, so that defendant could get someone to "run his restaurant and not lose his entire life's savings." After taking the matter under advisement, the court refused to modify the probation order. We find no abuse of discretion here. See *People* v. *Hobbs*, No. 49354, filed February 19, 1965.

For the reasons stated, the conviction of the defendant is affirmed.

Affirmed.

BURMAN, P.J., and KLUCZYNSKI, J., concur.

APPENDIX III

Constitutional Provisions and Statutes Involved

United States Constitution, Amendment XIV, Sec. 1:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Chapter 38, Section 33-3, Illinois Revised Statutes (1963):

"A public officer or employee commits misconduct when, in his official capacity, he commits any of the following acts:

"(a) Intentionally or recklessly fails to perform any mandatory duty as required by law; or

"(b) Knowingly performs an act which he knows he is forbidden by law to perform; or

"(c) With intent to obtain a personal advantage for himself or another, he performs an act in excess of his lawful authority; or

"(d) Solicits or knowingly accepts for the performance of any act a fee or reward which he knows is not authorized by law.

(Judgment of the Trial Court)

A public officer or employee convicted of violating any provision of this Section forfeits his office or employment. In addition, he shall be fined not to exceed $1,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to five years, or both fined and imprisoned. 1961, July 28, Laws 1961, p. 1983, § 33-3.

APPENDIX IV

Judgment of the Trial Court

The Court: • • • I find the defendant guilty of official misconduct and enter judgment on the findings. I sentence the defendant to 6 months in the House of Correction and 3 years probation. (Abst. 57)